CHAPTER 12

FISCAL LAW

INTRODUCTION

Fiscal law principles apply to all federal operations. For the military services, fiscal law issues frequently arise during contracting, drug interdiction, humanitarian and civil affairs, security assistance, disaster relief, and special forces operations. With a growing number of non-traditional missions to fulfill, the Department of Defense (DOD) increasingly encounters fiscal issues in conducting its operations. Failure to apply fiscal law principles properly may lead to unauthorized expenditure of funds, and to administrative and/or criminal sanctions against those responsible.

The U.S. Constitution gives Congress the authority to raise revenues and appropriate the proceeds to federal agencies. *See* Art. I, § 8. Courts have interpreted this Constitutional requirement as necessitating positive statutory authority for activities/expenditures by the Executive Branch. *See* US v. MacCollom, 426 U.S. 317, at 321 (1976) ("The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.") In implementing its Constitutional mandate, Congress provides expressed legal authority for military operations. In addition, Congress has strictly limited, by statute, the ability of the executive branch to obligate and expend certain appropriated funds. Finally, Congress and DOD have agreed informally to other restrictions, which generally require DOD to notify Congress before taking certain actions.

These restrictions are implemented by regulations and policies within DOD. Military practitioners should look to three primary sources of law to define this legal authority: (1) a statutory authorization found in Title 10 of the U.S. Code, (2) or the annual DoD Authorization Act, or (3) a specific appropriation in the annual DoD Appropriations Act. Without a clear statement of positive legal authority (or some other legislative intent expressed in a conference report, for example), the military attorney should be prepared to articulate a rationale for an expenditure which is "necessary and incident" to an existing authority. As a last resort, OSD may approve the expenditure of funds as a necessary and proper exercise of the President's Article II authority to conduct foreign policy or command the nation's armed forces [this latter approach is highly controversial, but has been used to justify expenditures for several recent operations where specific statutory authority was unavailable - at a minimum, JCS/OSD level approval is required prior to invoking this rationale].

BASIC FISCAL CONTROLS ON APPROPRIATED FUNDS

Congress has imposed fiscal controls through three basic mechanisms. Each is implemented by one or more statutes. The Comptroller General of the U.S., who heads the General Accounting Office (GAO), regularly audits executive agency accounts and scrutinizes compliance with the fiscal controls imposed by Congress. The three basic fiscal controls are:

(1) Obligations and expenditures must be for a proper purpose;
(2) Obligations must occur within the time limits applicable to the appropriation (e.g., operation and maintenance (O&M) funds are available for obligation for one fiscal year); and
(3) Obligations must be within the amounts authorized by Congress.

The enforcement mechanism adopted by Congress for these controls is the Antideficiency Act (ADA). *See* 31 U.S.C. § 1341(a), 1514(a). The ADA prohibits any government officer or employee from making or authorizing an expenditure in excess of the amount available in an appropriation; incurring an obligation in advance of an appropriation, except as authorized by law; or making or incurring obligations in excess of formal subdivisions of funds within the executive branch, or in excess of amounts prescribed by regulations governing the formal subdivisions of funds. Penalties for violations may be criminal or civil. 31 U.S.C. § 1349, 1350. Commanders must investigate suspected violations to establish responsibility, and discipline violators. DOD 7000.14-R, Financial Management Regulation, Vol. 14.

THE PURPOSE STATUTE -- GENERALLY

Although each of the above basic controls on the use of appropriated funds is important, the control which becomes an issue most often during military operations is the purpose control. Expenditures from an appropriation must be reasonably related to the purpose of that appropriation. 31 U.S.C. § 1301(a). The Comptroller General stated the test for a proper purpose in Secretary of the Interior, B-120676, 34 Comp. Gen. 195 (1954):

(1) An expenditure must be for the particular purpose of the appropriation or for a purpose that is necessary and incident to the general purpose of the appropriation.
(2) The expenditure must not be prohibited by law.
(3) The expenditure must not be otherwise provided for; it must not fall within the scope of some other appropriation.

The GAO applies the Purpose Statute to military operations. *See* To The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984) [hereinafter Honduras I]; The Honorable Bill Alexander, B-213137, Jan. 30, 1986 (unpub.) [hereinafter Honduras II].

Augmentation of an Appropriation Generally Is Prohibited

A corollary to the purpose statute's control on appropriated funds is the general prohibition against augmentation. *See* Nonreimbursable Transfer of Admin. Law Judges, B-221585, 65 Comp. Gen. 635 (1986); *cf*. 31 U.S.C. § 1532 (prohibiting transfers from one appropriation to another except as authorized by law). Appropriated funds designated for a general purpose may not be used to pay for an effort for which Congress has specifically appropriated other funds. Secretary of the Navy, B-13468, 20 Comp. Gen. 272 (1940). If two funds are equally available for a given purpose, an agency may elect to use

either, but once the election is made, the agency must continue to charge the same fund, absent legislation to authorize the change. Recording Obligations under EPA Cost-Plus-Fixed-Fee Contract, B-195732, 59 Comp. Gen. 518 (1980), *rev'd on other grounds*, 61 Comp. Gen. 609 (1982).

There are a few statutory exceptions to the prohibition on augmentations. For instance, DOD may expend its O&M funds for humanitarian assistance efforts that complement (but do not duplicate) activities funded by the appropriations of other agencies, such as the State Department. *See* 10 U.S.C. § 401. *See also* Foreign Assistance Act (FAA), 22 U.S.C. § 2344, 2360, 2392 (permitting foreign assistance accounts to be transferred and merged); 22 U.S.C. § 2318 (emergency Presidential draw down authority) (discussed below).

Another way Congress authorizes the lawful augmentation of accounts is to enact special interagency transaction authorities. These authorities limit or eliminate standard reimbursement requirements between agencies. The FAA (mentioned above and described below in more detail) and U.S. counterdrug policy provide good examples of this principle. For example, Congress has authorized certain expenditures for military support to civil law enforcement agencies (CLEAs) in counterdrug operations. [*See* Chapter 22 for a detailed description of these authorities.] Training is one of DOD's primary Operations and Maintenance (O&M) funded missions. In the law authorizing DOD's support for CLEAs, Congress provided that support is reimbursable unless it occurs during normal training and results in DOD receiving a benefit substantially equivalent to that which otherwise would be obtained from routine training or operations. *See* 10 USC § 377. In another statutory provision, §1004 of the 1991 DOD Authorization Act (as amended) [*See* Notes, 10 USCA § 374.], Congress authorized operations or training to be conducted for the sole purpose of providing CLEA's with specific categories of support. Finally, in 10 USC § 124, Congress assigned DOD the operational mission of detecting and monitoring international drug traffic (a traditional CLEA function). By authorizing DOD support for CLEA missions, essentially at no cost to CLEAs, Congress has provided authority for the augmentation of CLEA appropriations through the assistance provided by DOD's training operations (through the expenditure of O&M funds).

Other statutes which provide DOD authority to accomplish missions primarily assigned to other executive departments ("non-traditional DoD missions") include: 10 USC § 402 (transportation of humanitarian supplies), 10 USC § 404 (foreign disaster or refugee relief), and 10 USC §2551 (other humanitarian support). All of these purposes are also accomplished through foreign assistance appropriations, which are generally administered by the Department of State. *See* Chapter 23 & 24 for further discussion of these authorities.

There is no specific statute prohibiting augmentations. The prohibition flows from several statutory provisions which implement Congress' control of government funding. In the Honduras II opinion, the GAO described the concept in this manner:

> Because congressional authority is largely asserted through the appropriations process, the Congress places great significance on the rules that govern the use of appropriations by Federal agencies. It has devised specific measures to ensure that those rules are followed, and that, for instance, programs in one area are not supported by appropriations intended to be used elsewhere. *E.g.*, 31 U.S.C. § 1301(a), 1341(a), 1532. Honduras II at 2.

DOD Appropriations and their Purposes

Operation & Maintenance (O&M) Appropriations. These appropriations pay for the day-to-day expenses of DOD components in garrison and during exercises, deployments, and military operations. O&M appropriations may be expended for all "necessary and incident " operations and maintenance expenses. They are subject, however, to specific statutory limitations. For example, end items costing over $100,000, or which are centrally managed within the supply system, may not be purchased with these funds. Additionally, exercise-related construction of permanent facilities, during exercises coordinated or directed by the Joint Chiefs of Staff outside the U.S., or any construction in excess of $500,000, may not be funded with O&M appropriations.[1]

Military Construction (MILCON) Appropriations. Congress has extensive and pervasive oversight programs in place for MILCON appropriations. Virtually all construction projects costing more than $1.5 million require specific prior approval by Congress. Additionally, 41 U.S.C. § 12 provides that no public

[1] 10 U.S.C. § 2805. *But see, infra,* the text under the subheading O&M Appropriations -- Use During Deployments and Contingency Operations for a discussion of the possible expansion of O&M fund uses during contingency operations.

contract relating to erection, repair, or improvements to public buildings shall bind the Government for funds in excess of the amount specifically appropriated for that purpose. Nevertheless, there is also an Unspecified Minor Construction Program for minor construction projects within each military department and within DOD agencies. Money for these unspecified minor construction projects is set aside within each MILCON appropriation. The services use this money (normally a relatively small amount) for projects costing less than $1.5 million without specific congressional approval.

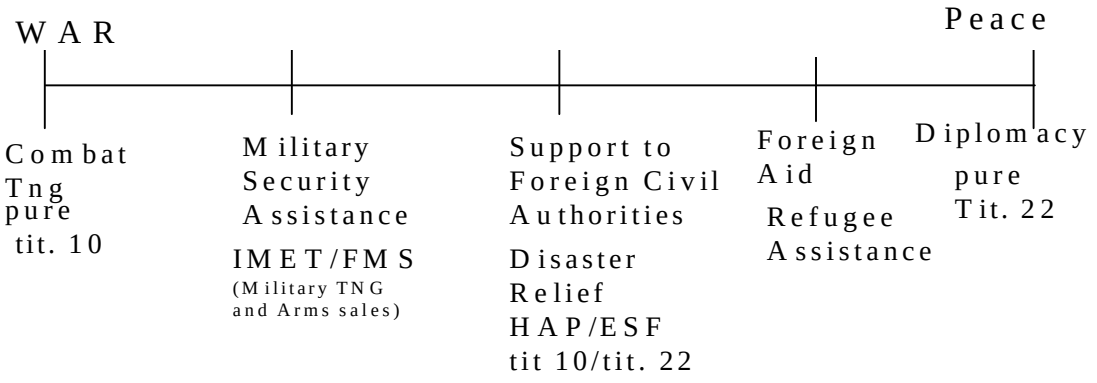
Procurement Appropriations. These appropriations fund purchases of investment end items of equipment (presently those costing more than $100,000), and items that are centrally managed within the supply system.

Other Appropriations. DOD receives dozens of other appropriations, each with its own fund citation and specific purpose. In an operational environment, however, the appropriations most likely to be encountered are those noted above. Additional guidance on the use of the O&M and MILCON appropriations is provided below.

THE PURPOSE STATUTE -- SPECIFIC MILITARY OPERATIONAL ISSUES

The above discussion of the Purpose Statute provides an overview of how this control mechanism applies to DOD operations. More specific applications of the Purpose Statute to military operations are described below.

The Funding Spectrum in Current Operations



Military fiscal authority can be analyzed across the spectrum of operations, based on a simple purpose statute analysis. As you move from right to left on the spectrum, the military funding authority becomes stronger, and the military purpose more clear. From left to right, the benefit to another country or group within a country increases, and the military practitioner must look for positive legal authority to justify military expenditures. It is important to understand where you are on this spectrum to answer the fiscal law questions and establish a valid rationale for the expenditure. [For example, you may conduct joint training in a given country for national security reasons, and still provide a benefit to the host country via *de minimis* Humanitarian and Civic Assistance activities.] Congress has increased the complexity of the analysis by authorizing all sorts of “non-traditional military activities” with specific legislation (i.e., Disaster Relief and Humanitarian Airlift provisions). Foreign Aid, funded and

administered by DOS or USAID under the authority of Title 22, is at the other end of the spectrum in the purpose statute analysis.

Method of Analysis:

The attorney can assist in the accomplishment of the mission, by guiding the staff and the commander to the appropriate fiscal authority. The following method of analysis is intended to assist the OPLAW Attorney, in conjunction with the operator, the comptroller, and the logistician, in recommending a course of action to the commander:

(1) Determine the Commander's Intent
(2) Define the Mission (both the organization's assigned mission and the specific task to be performed)
(3) Break it down into Discrete parts (Specified and Implied Tasks)
(4) Find Legislative Authority and/or Appropriated Funds
(5) Articulate the Rationale for the Specific Expenditures, and
(6) Seek Approval from Higher Headquarters, where necessary.

The lawyer's challenge is to match a specific legislative authority with each expenditure of funds. The lawyer and the comptroller may even have to go farther, and look at the line-item appropriation to determine the Congressional intent. Then the real challenge is to articulate the rationale for the expenditure (in message traffic or memorandum form), to persuade the next higher headquarters to approve the expenditure [or to justify an expenditure that the commander approves to the next auditor or GAO investigator]. Get help from higher headquarters when you can, but be prepared to explain the cold hard facts to your commander so that he can make the risk/benefit analysis that he is paid to make.

SPECIFIC FUNDING AUTHORITIES:

The following fiscal authorities are available to conduct military operations. Each authority reflects a specific legislative intent, which must be articulated by the military practitioner, in order to justify the expenditure.

O&M Appropriations -- Use During Deployments and Contingency Operations

Deploying units normally rely on O&M appropriations available to support their deployment operations. Attorneys, finance officers, contracting personnel, and others charged with responsibility in the funding of unit operations must be familiar with commonly encountered fiscal controls on appropriated funds, particularly the O&M accounts, and verify the amounts and types of funds available.

O&M appropriations pay for the day-to-day expenses of training, exercises, contingency missions, and other deployments. Examples of O&M expenses include force protection measures, sustainment costs, repair of essential Main Supply Routes (MSR's), as well as those expenses "necessary and incident" to an assigned military mission [e.g., costs of maintaining public order and emergency health and safety requirements of the populace in Haiti during the NCA-directed mission of "establishing a secure and stable environment"(prior to the return of a viable Aristide government)]. Where the military mission begins to stray from combat, or combat-related functions, and begins to intersect with other agencies' authority/appropriations, the expenditure bears close scrutiny by the Judge Advocate (e.g., "nation-building" activities, or refugee assistance - both traditional foreign assistance responsibilities, administered by the State Department or USAID).

[Note: The Deputy General Counsel of the Army for Fiscal Law & Policy has opined that O&M funds are the "appropriate funding source to acquire materials and/or cost of erection of structures during combat or contingency operations, as defined in 10 U.S.C. § 101(a)(13), that are clearly intended to meet a temporary operational requirement to facilitate combat operations." The memorandum also provides that "operations funds are the appropriate funding source to acquire weapons from indigenous or opposing forces under the 'Cash for Weapons' program." The basis for these opinions is that O&M funds are the primary funding source supporting combat operations; therefore, if a unit is fulfilling legitimate requirements necessitated only by the combat operation, then O&M appropriations are the proper

funding source. *See* TJAGSA Practice Notes, Contract Law Note: Funding Issues in Operational Settings, *Army Law.*, Oct. 1993, at 38.[2] Example: Road work by engineers during Operation Restore Hope.[3]
Analysis of whether combat construction is "temporary" should focus on the duration and purpose of a facility's use by U.S. forces, not on the materials used in the construction. A brick latrine may meet a temporary need for a latrine facility which affords its occupants some protection from sniper fire.[4] Normal funding rules apply in all other situations, including the funding of construction for which the U.S. would have a follow-on or contingency use after the termination of the military operations necessitating the construction.]

Feed and Forage Act (41 U.S.C. § 11 & 11a) provides special obligational authority. The act permits DOD and the Coast Guard to contract for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies for the current fiscal year, even in the absence of an appropriation (i.e., this is a special authority to spend in advance of normal O&M appropriations). Notice to Congress is required. On August 24, 1990, the SECDEF invoked the provisions of 41 U.S.C. § 11 to support Desert Shield.

Emergency and Extraordinary (E&E) Expenses (10 U.S.C. § 127) are special funds within the O&M appropriation. The Secretaries of the military departments and the SECDEF may expend these funds without regard to other provisions of law. However, numerous regulatory controls apply to prevent abuse, including Congressional notification requirements for expenditures over $500,000. *See* DOD Dir. 7250.13, Official Representational Funds (Mar. 22, 1985); AR 37-47, Contingency Funds of the Sec'y of the Army (Jan. 15, 1990).

Secretarial Contingency Funds (10 U.S.C. § 127a) provide the SECDEF with authority to fund the incremental costs of contingency operations, including humanitarian assistance, disaster relief, or support for law enforcement (immigration) [$1.1B appropriated for FY 97 was quickly consumed in Bosnia]. Allows for waiver of DBOF reimbursement and transfer authority to service O&M accounts to reimburse operating funds for expenses incurred.

CINC Initiative Funds (CIF) (10 U.S.C. § 166a) are O&M funds available for special training, humanitarian assistance, civic assistance, and other selected operations which are unforeseen contingency requirements critical to CINC joint warfighting readiness and national security interests. *See* CJCSI 7401.01, 11 Jun 1993 (detailing procedures for CJCS approval of these expenditures). The CINCs also receive O&M funding, through the services, for “Traditional CINC Activities” (TCA) like military-to-military contacts, joint training, regional conferences, based on these and other Title 10 authorities discussed below. *See also* discussion in Chapters 23 and 24 on CIF and TCA, respectively.

Congress regularly earmarks funds within annual O&M appropriations to be used only for specific purposes. For instance, DOD receives part of its O&M funds earmarked for use in providing humanitarian and civic assistance under 10 U.S.C. § 401(c). Such earmarked appropriations require separate fiscal accounting. DOD may not use general O&M appropriations for the same purposes as the funds earmarked for specific purposes within an annual authorization or appropriations act. *See, e.g.*, Department of Defense Appropriations Act, 1997, Pub. L. No. 104-208, Title II, 110 Stat. 3009 (1996) ($49,000,000 provided for Humanitarian Assistance Programs during FY 1997).

Military Construction -- A Special Problem Area

As noted above, congressional oversight of military construction is extensive and pervasive. Specific approval is required for any project in excess of $1.5 million. Funds for such larger projects,

[2] Before relying on this analysis, please note that the use of this policy is restricted to “combat operations”, as opposed to the much broader “contingency operation” setting referred to in the practice note.

[3] The reader should be cautioned that this exception is based on policy, not law or regulation. Any decision to use this exception should be coordinated with higher headquarters.

[4] *Compare* “temporary construction” analysis in Military Construction section, below.

known as the Specified Military Construction Program, are provided in the annual MILCON appropriations.

The Unspecified Minor Construction Program:

MILCON appropriations also fund part of the Unspecified Minor Military Construction Program, through which Congress provides annual funding to DOD and the military services for minor construction projects that are not specifically approved in a MILCON Appropriations Act. Pursuant to the unspecified minor construction authority of 10 U.S.C. § 2805(a), the Secretary concerned may use minor military construction funds (known as Minor Military Construction, Army, or MMCA funds for the Army) for minor projects not specifically approved by Congress.

(1) This authority is limited to $1.5 million for each project. Because 10 U.S.C. § 2805(c) permits the use of O&M funds for construction below $500,000, DOD has elected to use minor military construction funds only for projects in the $500,000 to $1.5 million range, except during JCS-controlled exercises outside the U.S.

(2) Statute and regulations require approval by the Secretary of the department and notice to Congress before commencement of any minor military construction project exceeding $500,000.

(3) Besides projects costing between $500,000 and $1.5 million, minor military construction funds (MMCA for Army) also pay for all permanent construction during JCS-coordinated or directed exercises conducted outside the U.S. *See* 10 U.S.C. § 2805(c)(2). The authority for such exercise-related construction is limited to no more than $5 million per military department per fiscal year. 10 U.S.C. § 2805(c)(2). This limitation does not affect funding of minor and truly temporary structures such as tent platforms, field latrines, shelters, and range targets that are completely removed once the exercise is completed. Units may continue to fund these through the O&M accounts. See below, however, regarding notification requirements if such work totals more than $100,000.

O&M: Most installations and deploying units are funded only with O&M appropriations, which are not available for construction work, except as specifically authorized by law. They must request MILCON or minor military construction funds from higher headquarters.

(1) 10 U.S.C. § 2805(c) authorizes use of O&M funds for unspecified minor military construction projects, but limits this authorization to $500,000 per project. O&M appropriations are normally the source of funds for the portion of the unspecified minor military construction program below the $500,000 per project level. *See* AR 415-15 (30 Aug. 1994); AR 420-10 (2 July 1987).

(2) Projects must have a funded cost of $500,000 or less to be paid for with O&M funds. Funded cost refers to the "out-of-pocket" cost of a project, such as contract costs, TDY costs, etc. It does not include the salaries of military personnel, depreciation on equipment, and similar "sunk" costs. The cost of fuel used to operate equipment is a funded cost. Although unfunded costs do not count toward the statutory ceilings applicable to the different types of construction funds, records of unfunded costs are kept, and these figures are reported to higher headquarters.

(3) Project splitting is prohibited. An agency cannot treat "clearly interrelated" construction activities as separate projects. Honduras II, p. 22.

DOD must notify Congress if construction (temporary or permanent) exceeding $100,000 will be done during any exercise. *See* Military Construction Appropriations Act, 1995, Pub. L. No. 103-307, § 113, 108 Stat. 1659, 1664 (1994).
Military construction, as defined in 10 U.S.C. § 2801 and AR 415-35, includes any construction, development, conversion, or extension of any kind carried out with respect to a military installation. The definition of a military installation is very broad, and includes foreign real estate under the operational

control of the U.S. military. Military construction includes all work necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility. *See* The Honorable Michael B. Donley, B-234326.15, Dec. 24, 1991 (unpub.) (project splitting is prohibited). Minor military construction, whether accomplished with O&M or MMCA funds, is a single undertaking at a military installation with an approved cost equal to or less than $1.5 million. Examples of construction (*see* AR 415-15, Glossary, sec. II, Terms):

(1) The erection, installation, or assembly of a new facility.
(2) A change to a real property facility, such as addition, expansion, or extension of the facility, that adds to its overall external dimensions.
(3) Acquisition of a "existing facility," or work on an existing facility that improves its functions or enables it to fulfill changed requirements. Such work is often called an alteration of the facility. This includes installation of equipment made a part of the existing facility.
(4) Conversion of the interior or exterior arrangements of a facility so that the facility can be used for a new purpose. This includes installation of equipment made a part of the existing facility.
(5) Replacement of a real property facility, which is a complete rebuild of a facility that has been destroyed or damaged beyond economical repair.
(6) Relocation of a facility from one installation to another and from one site to another.

Construction includes the cost of installed equipment that is made part of a new or existing facility, related site preparation, excavation, filling, landscaping, or other land improvements.

Maintenance and repair are not construction. Maintenance is recurrent work to prevent deterioration; i.e., work required to preserve or maintain a facility in such condition so it is usable for its designated purpose. AR 420-10, Management of Installation Directorates of Eng'g & Housing, sec. II, Terms (July 2, 1987). Repair is restoration of a facility, so it may be used for its designated purpose, by overhauling, reprocessing, or replacing parts or materials that have deteriorated by action of the elements or by wear and tear in use, and which have not been corrected through maintenance. AR 420-10, sec. II, Terms. When construction and maintenance or repair are performed together as an integrated project, each type of work is funded separately, unless the work is so integrated that separation of construction from maintenance or repair is not possible. In the latter case, fund all work as construction.

Methodology for analysis of minor construction issues:
- Define the scope of the project;
- Classify the work as construction, repair, or maintenance;
- Determine the funded cost of the project; and
- Select the proper appropriation.

Examples:

1. A US Army unit deploys to central Europe at the request of a newly-elected democratic government. It occupies a former Soviet installation as a base. A large multi-story barracks facility is proposed for conversion to an administration facility. The Division Engineer advises that the work involved will include: (a) replacement of the roof, the flooring, several interior walls, and the heating system ($1.1 million); (b) repair of numerous other failing components of the building ($450,000); (c) installation of a new central air-conditioning unit ($150,000); and (d) construction of new walls to accommodate the new configuration ($100,000). The Division Engineer proposes to classify the project work as mostly repair work, with a small amount of new construction. The total funded cost of the project is estimated to be $1.8 million. Because the air-conditioner and new walls will cost only $250,000, the Division Engineer contends that the entire project can be approved and funded locally. Is the Division Engineer right? No. A conversion is construction by definition. All work is required for the conversion of this building to an administrative facility, so it must all be funded as construction (use MILCON money because the cost exceeds $1.5 million). If U.S. forces were to continue using the facility as a barracks, then the air-conditioning and new walls could be segregated from the other (repair) efforts, and all work could be funded with O&M money.

2. The road to the division fuel supply point is in urgent need of repair. The division's training tempo increased substantially last year, so the road has been getting greater use by heavier vehicles than it was designed to handle. Heavy delivery trucks used by the fuel supplier with the current contract

for diesel fuel and gasoline have been breaking up the road. The Division Engineer believes that, in addition to filling up the holes in the road, two additional inches of asphalt should be added to support the increased and heavier traffic. The Division Engineer estimates that a paving contractor will charge $530,000 to fill the holes and add two inches of asphalt. The Division Engineer insists that O&M funds can be used. Is the Engineer correct? Maybe. Filling the potholes is clearly a repair, and this cost does not count against the cost of the construction effort. Resurfacing the road may be a repair if the resurfacing is intended to restore the road to its former capacity, not to improve it for heavier use, and if this is the method normally used to maintain and/or repair roads of this type. To the extent it upgrades the road, however, it may be construction, particularly considering the fact that the exterior dimensions of the road will change (two inches thicker). The cost of this portion of the work may be less than $500,000 (if the potholes cost more than $30,000 to repair), however, so O&M funds may be appropriate for this work even if it is considered construction.

3. What if the road in Example 2 is located in Northern Saudi Arabia in February 1991? The work under these circumstances is clearly not part of an effort to improve post infrastructure; apparently it is needed to support ongoing combat operations. Therefore, this work is more likely to qualify as a repair. Even if it is considered construction, and even if the cost of the two inches of additional asphalt exceeds $500,000, the work may fall within the scope of the potential expansion of the use of O&M funds during combat operations discussed above in the **O&M Appropriations -- Use During Deployments and Contingency Operations** section above.

Emergency Construction Authority:

Upon a Presidential Declaration of National Emergency, 10 U.S.C. § 2808 permits the Secretary of Defense to undertake construction projects not otherwise authorized by law that are necessary to support the armed forces. Such projects are funded with any unobligated military construction and family housing appropriations. On November 14, 1990, President Bush invoked emergency construction authority under 10 U.S.C. § 2808 for support of Operation Desert Shield. *See* Executive Order 12734 of November 14, 1990, 55 Fed. Reg. 48099. Other emergency construction authorities available under existing law include:

> Emergency Construction, 10 U.S.C. § 2803. Requirements: 1) notice to congressional appropriations committees; 2) determination that project is vital to national defense; 3) a twenty-one day waiting period after notification before project begins; and, 4) total amount expended must not exceed $30 million in any fiscal year, and the funds must be obtained by reprogramming money already appropriated but not yet obligated for military construction.
>
> Contingency Construction, 10 U.S.C. § 2804. Requirements: 1) notice to congressional appropriations committees; 2) project justification; 3) a twenty-one day waiting period after notification before project begins; and 4) obtain funds from monies already appropriated for military construction, but not yet obligated.

During Operation Desert Shield, these authorities were not timely exercised. Future operational plans should include provisions to exercise these authorities immediately upon execution, so construction and improvement of logistics facilities can commence immediately with the proper appropriations.

Contacts and Exercises with Foreign Militaries

Congress has provided ample authority for bilateral and multilateral contacts with foreign militaries. These authorities are the heart of the current Partnership for Peace (PFP) program, as well as many other joint training, military-to-military contact, and exercise programs. The main thrust of these authorities is to fund U.S. costs of preparing and conducting combined training, as well as paying selected incremental costs for our training partners. [*See also* Chapter 24, Security Assistance]

Bilateral and Multilateral Contacts:

5 U.S.C. § 4109-4110; 31 U.S.C. § 1345(1); 37 U.S.C. § 412 (Travel). Travel to conferences and site visits are supported with a variety of statutory authorities.[5] U.S. civilian employees and Military personnel are authorized to expend US funds under the Joint Travel Regulations (JTR), para. C.6000.3, individuals performing services for the government may also be funded.
10 U.S.C. § 1050 (Latin American Cooperation - LATAM COOP) authorizes service secretaries to pay the travel, subsistence, and special compensation of officers and students of Latin American countries and other expenses the secretaries consider necessary for Latin American cooperation.
10 U.S.C. § 1051 (Bilateral or Regional Cooperation Programs) provides similar authority to pay travel expenses and other costs associated with attendance at bilateral or regional conferences, seminars, or similar meetings if the SECDEF deems attendance in the U.S. national security interest. *See also* DOD Authorization Act for FY 97, Pub. L. No. 104-201 (110 Stat. 3009), § 1065 and §8121 (1996), authorizing support for participation in Marshall Center activities for European and Eurasian nations, and attendance by foreign military officers and civilians at seminars and similar studies at the Asia-Pacific Center for Security Studies, respectively.
10 U.S.C. § 168 (Military-to-military Contacts) authorizes the SECDEF to conduct military-to-military contacts and comparable activities that are designed to encourage democratic orientation of defense establishments and military forces of other countries.
Funding - All of these activities are funded with O&M funds [often with Service funding, TCA, or CIF, as described above].

Bilateral and Multilateral Exercise Programs:
10 U.S.C. § 2010 (Developing Country Exercise Program - DCCEP) authorizes payment of incremental expenses of a developing country incurred during bilateral or multilateral exercises if it enhances U.S. security interests and is essential to achieving the fundamental objectives of the exercise.
10 U.S.C. § 2011 (Special Operations Force - SOF Training) permits the SOCOM Commander or Combatant CINC to fund the expenses of training all Special Operations Forces [Civil Affairs, PSYOP, Special Forces, Seals, Rangers, Special Boat Units, AFSOC, etc.] training with the armed forces or security forces of a friendly foreign country, including incremental expenses.
Incremental expenses incurred as the result of these training authorities include rations, fuel, training aids, ammunition, and transportation; they do not include pay, allowances, and other normal costs for the country's personnel.

Regional Cooperation Programs:
Partnership for Peace activities are authorized by existing authorities, outlined above;[6] $109M ($49M DoD and $60M DOS) was provided for FY 97.
Cooperative Threat Reduction with States of the Former Soviet Union (FSU) ("Nunn-Lugar") provides funds for various programs to dismantle the FSU's arsenal of weapons of mass destruction;[7] $327.9M appropriated for 97.

International Military Education and Training **(IMET)** - [Foreign Assistance Act (FAA) §§ 541-545 (22 U.S.C. §§ 2347-2347d)] is a security assistance program to provide training to foreign militaries, including the proper role of the military in civilian-led democratic governments and human rights [often called **Expanded-IMET**].

Overseas Humanitarian, Disaster, and Civic Assistance (OHDCA) Operations

Congress has provided limited authority to DOD to conduct Overseas Humanitarian, Disaster and Civic Aid (OHDCA) operations [also known as Humanitarian Assistance Programs (HAP)]. *See* DOD Appropriations Act, 1997, Pub. L. No. 104-208, Title II, 110 Stat. 3009 (1996) ($49M provided for all programs conducted under the authority of 10 U.S.C. §§ 401, 402, 404, 2547, and 2551 during FY 1997). [*See also* Chapter 23, Humanitarian and Foreign Disaster Assistance]

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[5] 31 U.S.C. § 1345 requires a specific appropriation for travel, transportation, and subsistence expenses for meetings. *See also* 62 Comp. Gen. 531 (1983).
[6] See H.R. Conf. Rep. No. 747, 103d Cong., 2d Sess. 63 (1994)

[7] DoD Authorization Act for FY 97, Pub. L. 104-201 § 1453 (1996). *But see* §§1501-1504, prohibiting use of funds for peacekeeping exercises, housing, environmental restoration or job training.

Primary responsibility for Humanitarian, Refugee. and Disaster Relief operations lies with the Department of State, through the U.S. Agency for International Development (USAID) and other subordinate agencies, like the Office of Foreign Disaster Assistance (OFDA).

FAA §492(10 U.S.C. § 2292) (International Disaster Assistance): The President may furnish foreign disaster assistance under such terms and conditions as he determines appropriate pursuant to the Foreign Assistance Act (FAA) §§ 491-496 (22 U.S.C. §§ 2292-2292q). *See* Foreign Assistance Appropriations Act for FY 97, Pub. L. 104-208, Title II, 110 Stat. 3009 (1996) ($190M appropriated to DOS for international disaster assistance under this authority).

FAA § 506(a)(1) (22 U.S.C. § 2318(a)(1))(Emergency Drawdown) permits the President to draw down defense stocks and services in response to unforeseen emergencies requiring military assistance to a foreign country or international organization. Use of this authority requires notice to Congress, and is limited to $100 million per fiscal year. [Note: no contracting is permissible under Drawdown authority.]

FAA § 506(a)(2) (22 U.S.C. § 2318(a)(2))(Emergency Drawdown) The President may also require any US Government agency to provide support to counterdrug activities, disaster relief, or migrant and refugee assistance efforts of other federal agencies through an FAA § 506 drawdown, up to $150M per year. [Note: 506(a)(2) Drawdown for counterdrug activities and POW accounting are limited to $75M and $15M, respectively; DoD provides no more than $75M of goods and services per year under this authority.]

Refugee Assistance (22 U.S.C. 2601c) The Department of State is assigned responsibilities for refugee support in the Migration and Refugee Assistance Act of 1962. *See* Foreign Assistance Appropriations Act for FY 97, Pub. L. 104-208, Title II, 110 Stat. 3009 (1996) ($650M appropriated to DOS to support refugee operations, the International Organization for Migration (IOM), the International Committee of the red Cross (ICRC) and the United Nations High Commissioner for Refugees (UNHCR); as well as $50M of no-year money to support the Emergency Refugee and Migration Assistance Fund). (*See also* provisions of the Refugee Assistance Act of 1980, § 501 (8 U.S.C. 1522 note), authorizing the President to direct other agencies to support Cuban and Haitian Refugees on a reimbursable or non-reimbursable basis).

FAA § 632 (22 U.S.C. § 2392)(DOS Reimbursement) Under this authority, similar to the Economy Act, discussed below, DOS may provide funds to other executive departments to assist DOS in accomplishing their assigned missions (usually implemented through "632 Agreements" between DOD and DOS).

Fiscal Law Issues in Honduras: Historically, DOD conducted limited Humanitarian and Civic Assistance (HCA) operations in foreign nations without separate statutory authority. In 1984, the Comptroller General decided in the Honduras I opinion that DOD's extensive use of O&M funds to provide HCA violated the Purpose Statute (31 U.S.C. § 1301(a)) and other well-established fiscal principles. The GAO concluded that DOD had used its O&M accounts improperly to fund what was essentially foreign aid and security assistance. The Honduras I opinion applied a three-pronged test to determine whether certain expenses for construction and to provide medical and veterinary care were proper expenditures:

> First and foremost, the expenditure must be reasonably related to the purposes for which the appropriation was made . . . . Second, the expenditure must not be prohibited by law . . . . Finally, the expenditure must not fall specifically within the scope of some other category of appropriations.
> Honduras I at 427-28.

This test is widely used to analyze fiscal law problems. Applying it to the military construction, training and HCA operations conducted in Honduras in 1983, the GAO disapproved certain expenditures using O&M funds which were reasonably related to DOD purposes (that is, expenditures which achieved "readiness and operational benefit" for DOD), but which failed the other tests. The GAO determined that the otherwise valid O&M expenditures were improper either because they were prohibited by law (violating the second prong of the above test), or because they achieved objectives which were within the scope of more specific appropriations, such as appropriations to the State Department for foreign aid under the FAA or the Arms Export Control Act (violating the third prong). Honduras II at 27-30. The opinion did recognize, however, that limited HCA was permissible, using O&M funds. *See* Honduras II at 38. *See also* 10 U.S.C. 401c(4) and DOD Dir. 2205.2, Humanitarian and Civic Assistance (defining *de minimis* HCA). It is this controversy which spurred the development of separate legislative authority to conduct humanitarian activities.

DOD Statutory Authorities:
10 U.S.C. § 401 (HCA) provides for Humanitarian and Civic Assistance (HCA) projects, approved in coordination with the Combatant CINCs and DOS, which improve operational readiness skills of participating U.S. forces and are conducted in conjunction with military operations [HCA projects are often conducted during JCS-directed exercises, or deployments for training]. Section 401 was recently expanded to include authority for training host nations in the removal of land mines; this section limits . *See,* 10 U.S.C. § 401(e)(5).
10 U.S.C. § 402 (Transportation) DOD may transport supplies provided by nongovernmental sources without charge on a space-available basis. DOD cannot use this authority to supply a military or paramilitary group.
10 U.S.C. §404 (Foreign Disaster Assistance) The President may direct SECDEF to provide disaster assistance outside the U.S. to respond to manmade or natural disasters when necessary to prevent the loss of life. Includes transportation, supplies, services, and equipment; but requires notice to Congress within 48 hours. OHDCA funds are available for organizing general policies and programs for disaster relief programs. The President delegated authority to provide disaster relief to SECDEF, with concurrence from DOS (except in emergency situations). *See* EO 12966, 60 Fed. Reg. 36949 (15 July 1995).
10 U.S.C. § 2547 (Excess Nonlethal supplies: Humanitarian Relief) authorizes excess supplies be made available for humanitarian relief to DOS, who will be responsible for distribution. May be used in conjunction with other authorities to provide transportation or 2551 authority for funding incidental costs.
10 U.S.C. § 2551(Transportation and Other Humanitarian Support) DOD may also provide fully funded transportation (on an other-than space-available basis), if it pays such transportation costs with its O&M funds earmarked for OHDCA purposes. In addition, this statute permits the use of funds for "other humanitarian purposes, worldwide." This permits payment of all costs, including contracts if necessary,

JA's Role: The JA's primary role during military operations that involve disaster relief, humanitarian, or refugee support operations is to ensure mission accomplishment within the constraints of current law. This is the most difficult area of fiscal law practice. It requires an in-depth understanding of the statutory authorities. The general rule is that only O&M funds earmarked for OHDCA purposes are used for this support. 10 U.S.C. § 127a Contingency Funds, 166a CINC Initiative Funds (CIF), and Traditional CINC Activity funding (TCA) provide secondary sources. The JA must ensure that problems are identified during exercise planning and avoided. After-the-fact justifications which stretch the DOD authorities risk GAO scrutiny and adverse ramifications for those who seek to circumvent congressionally-imposed limitations.

Supporting Multilateral Peace and Humanitarian Operations

U.S. support to other nations or international organizations during multilateral operations is authorized by a number of provisions of the Foreign Assistance Act, Title 10 U.S.C., the Arms Export control Act, and other statutes. With respect to UN support, PDD-25 emphasizes the necessity of reducing costs for UN peace operations, reforming UN management of peace operations, improving U.S. management and funding of peace operations (including increased cooperation between the Legislative and Executive branches). The U.S. will generally seek either direct reimbursement for the provision of goods and services to other nations or international organizations, or credit against a UN assessment. In rare circumstances, the U.S. may contribute goods, services, and funds on a voluntary basis, waiving reimbursement. DOS has responsibility for oversight and management of Chapter VI operations where U.S. combat units are not participating; DoD has responsibility for Chapter VI operations in which U.S. forces are participating and all Chapter VII operations. [*See generally* Chapter 25, Peace Operations.]
Authorities: Much like Disaster Relief and Refugee support, DOS has the lead in providing support to other nations engaged in Peacekeeping Operations (PKO). *See* FAA § 551 (22 U.S.C. 2348). *See also* Foreign Operations Appropriations Act for FY 97 (additional appropriations), Title V, Chapter 7, *reprinted in* H.R. Rep. 863, 104th Cong., 2d Sess. 536 (1996) (DOS provided $65M to support PKO). Other than the authorities mentioned below, DoD is prohibited from providing direct or indirect contributions to the UN for peacekeeping operations or to pay UN arrearages. 10 U.S.C. § 405. In addition, under § 8092 of the DOD Appropriations Act for FY 97, Pub. L.104-208 (1996), DoD is also required to notify Congress 15 days before transferring to another nation or international organization any defense articles or services in connection with peace operations under Chapter VI or VII of the UN Charter or any other

international peacekeeping, peace enforcement, or humanitarian assistance operation. This requirement affects all of the authorities described in this section, or the preceding section, unless they already contain Congressional notification requirements. In practice, DOD is providing blanket notifications for all PKO or Humanitarian operations where goods or services are being transferred to other nations or international organizations. The President has expressed concern to Congress over the apparent infringement on his Constitutional powers as Chief Diplomat and Commander-in-chief. Statement of 30 November, 1995

UN Participation Act (UNPA) § 7 (22 U.S.C. 287d-1) authorizes support to the UN, upon their request, to assist in the peaceful settlement of disputes (not involving the employment of armed forces under Chapter VII). Includes detail of up to 1000 military personnel as observers, guards, or any other non-combatant capacity, and furnishing of facilities, services, or other assistance and loan of U.S. supplies and equipment. The statute generally requires reimbursement, except when it has been waived in the national interest (authority delegated to DOS by EO 10206, 16 Fed. Reg. 529 (1951)).

FAA § 506(a)(1&2) (22 U.S.C. § 2318(a)(1&2))(Emergency Drawdown) With the limitations discussed above, these drawdowns may also be used to support multilateral peace and humanitarian operations.

FAA § 552(c)(2) (22 U.S.C. § 2348(c)(2))(PKO Drawdown) A FAA § 552 drawdown, of up to $25M per year from any federal agency, may be used to support peace operations in "unforeseen emergencies, when deemed important to the national interest."

Bosnia Drawdown Authority - up to $100M of DOD articles and services to assist the government of Bosnia-Herzegovina in self-defense. Foreign Operations, Export Financing, and Related Programs Act of 1996, Pub. L. 104-107, § 540 (1996). *See also* DOD Authorization Act for FY 97, Pub. L. 104-201 § 1083 authorizing "most favorable pricing" for the drawdown support.

Detailing of Personnel FAA § 627 (22 U.S.C. § 2387) authorizes detailing of officers or employees to foreign governments, when the President determines it furthers the purposes of the FAA. FAA § 628 (22 U.S.C. § 2388) allows a similar detailing to international organizations, to serve on their staff, or provide technical, scientific, or professional advice or services. Detailed individuals are not allowed to take an oath of allegiance or accept compensation - per § 630 of the FAA (22 U.S.C. § 2390). 22 U.S.C. § 1451 authorizes the Director of the U.S. Information Agency (USIA) to assign U.S. employees to provide scientific, technical, or professional advice to other countries. This does not authorize details related to the organization, training, operations, development, or combat equipment of a country's armed forces. 10 U.S.C. § 712 authorizes the President to detail members of the armed forces to assist in military matters in any republic in North, Central, or South America. All of these details may be on a reimbursable or a non-reimbursable basis.

FAA § 516 (22 U.S.C. § 2321j) (Excess Defense Articles) - Defense articles no longer needed may be made available to support any country for which receipt of grant aid was authorized in the Congressional Presentations Document (CPD). Priority is still accorded to NATO and southern-flank allies. There is an aggregate ceiling of $350M per year, beginning in FY 97; cost is determined using the depreciated value of the article. No space available transportation is authorized, normally; but DoD may pay packing, crating, handling and transportation costs to PFP eligible nations under the Support to Eastern European Democracy (SEED) Act of 1989. *See* Defense Security Assistance and Improvements Act, § 105, Pub. L. 104-164 (1996).

Reimbursable Support - The primary authority for reimbursable support is FAA § 607 (22 U.S.C. § 2357), which authorizes any federal agency to provide commodities and services to friendly countries and international organizations on an advance of funds or reimbursable basis. Support to the UN and other foreign nations are usually provided under provisions of a "607 Agreement" with the nation or organization, detailing the procedures for obtaining such support; DOS must delegate authority to DOD to negotiate these agreements. FAA § 632, authorizing transfer of funds from DOS, and the Economy Act, discussed below, are also means of providing reimbursable DOD support. Finally, Foreign Military Sales (FMS) or Leases, provided under authority of the Arms Export Control Act (AECA) §§ 21-22 & 61-62 (22 U.S.C. §§ 2761-62 & 2796), respectively, permit the negotiation of FMS contracts or lease agreements to support countries or international organizations - reimbursement usually includes administrative overhead, under Defense Security Assistance Agency (DSAA) procedures. [*See* Chapter 24, Security Assistance.]

10 U.S.C. §§ 2341-2350 (Acquisition and Cross Servicing Agreements (ACSAs)) This provides DOD authority to acquire logistic support without resort to commercial contracting or FMS procedures and to transfer support outside of the AECA. Under the statutes, after consultation with DOS, DOD may enter into agreements with NATO countries, NATO subsidiary bodies, other eligible countries, the UN, and

international or regional organizations for the reciprocal provision of logistic support, supplies, and services. Acquisition and transfers are on a cash reimbursement, replacement-in-kind, or exchange-of-equal-value basis. Many ACSAs already exist - check with Combatant CINC to determine if they are administering an ACSA for the subject country within the AOR; JCS must approve new negotiations.

Security Assistance

Funding for aid to foreign armies is specifically provided for in foreign assistance appropriations. Transfers of defense items and services to foreign countries is regulated by the Arms Export Control Act. 22 U.S.C. §§ 2751-96. *See also* DOD Reg. 7000.14-R, Financial Mgmt. Reg., vol. 15, Security Assistance Policy and Procedures (Mar. 18, 1993). Providing weapons, training, supplies, and other services to foreign countries must be done in compliance with the Arms Export Control Act, the Foreign Assistance Act (FAA) (22 U.S.C. §§ 2151-2430i), and other laws.

The Arms Export Control Act

The Arms Export Control Act permits DOD and commercial sources to provide defense articles and defense services to foreign countries to: enhance the internal security or legitimate self-defense needs of the recipient; permit the recipient to participate in regional or collective security arrangements; or permit the recipient to engage in nation-building efforts. 22 U.S.C. § 2754. Section 21(a)(1) of the Arms Export Control Act (22 U.S.C. § 2761(a)(1)) permits the sale of defense articles and services to eligible foreign countries. State Department appropriations and foreign countries' own revenues fund Arms Export Control Act activities. To sell defense articles and services (procured with DOD appropriations) to foreign countries, the State Department first obtains them from the DOD. The Defense Security Assistance Agency (DSAA) manages the process of procuring and transferring defense articles and services to foreign countries for the State Department. This process provides for reimbursement of the applicable DOD accounts from appropriated State Department funds, or from funds received from sales agreements directly with the foreign countries.

The reimbursement standards for defense articles and services are established in Section 21(a)(1) of the Arms Export Control Act (22 U.S.C. § 2761(a)(1)). For defense articles the reimbursement standards are:

> not less than [the] actual value [of the article], or the estimated cost of replacement of the article, including the contract or production costs less any depreciation in the value of such article.

For defense services the reimbursement standards are:

> [f]ull cost to the U.S. Government of furnishing such service [unless the recipient is purchasing military training under the International Military Education and Training or IMET section the FAA, 22 U.S.C. § 2347] . . . [the value of services provided in addition to purchased IMET is recovered at] additional costs incurred by the U.S. Government in furnishing such assistance.

Section 21(e) of the Arms Export Control Act (22 U.S.C. § 2761(e)) requires the recovery of DOD costs associated with its administrative services in conducting sales, plus certain nonrecurring costs and inventory expenses.

The Foreign Assistance Act (FAA)

The FAA has two principal parts. Part I provides for foreign assistance to developing nations; Part II provides for military or security assistance. The FAA treats these two aspects of U.S. government support to other countries very differently. The treatment is different because Congress is wary of allowing the U.S. to be an arms merchant to the world, but supports collective security and efforts to defeat communism. *See* 22 U.S.C. § 2301. The purposes served through the provision of defenses articles and services under Part II of the FAA are essentially the same as those described for the Arms Export Control Act (*see* 22 U.S.C. § 2302), but under the FAA, the recipient is more likely to receive the defense articles or services free of charge.

Congress imposes fewer restraints on non-military support (foreign assistance) to developing countries. The primary purposes for providing foreign assistance under Part I of the FAA are to: alleviate poverty; promote self-sustaining economic growth; encourage civil and economic rights; and integrate developing countries into an open and equitable international economic system. *See* 22 U.S.C. §§ 2151, 2151-1. In addition to these broadly defined purposes, the FAA contains numerous other specific authorizations for providing aid and assistance to foreign countries. *See* 22 U.S.C. §§ 2292-2292q (disaster relief); 22 U.S.C. § 2293 (development assistance for Sub-Saharan Africa).

The overall tension in the FAA between achieving national security through mutual military security, and achieving it by encouraging democratic traditions and open markets, is also reflected in the interagency transaction authorities of the act (*compare* 22 U.S.C. § 2392(c) *with* 22 U.S.C. § 2392(d) (discussed below)). DOD support of the military assistance goals of the FAA is generally accomplished on a full cost recovery basis; DOD support of the foreign assistance and humanitarian assistance goals of the FAA is accomplished on a flexible cost recovery basis.

By authorizing flexibility in the amount of funds recovered for some DOD assistance under the FAA, Congress permits some contribution from one agency's appropriations to another agency's appropriations. That is, an authorized augmentation of accounts occurs whenever Congress authorizes recovery of less than the full cost of goods or services provided. The authorized augmentation occurs because, under generally applicable fiscal principles (the Purpose Statute and the Economy Act), full cost recovery is required.

State Department reimbursements for DOD or other agencies' efforts under the FAA are governed by 22 U.S.C. § 2392(d). Except under emergency Presidential draw down authority (22 U.S.C. § 2318), reimbursement to any government agency supporting State Department objectives under "subchapter II of this chapter" (Part II of the FAA (military or security assistance)) is computed as follows:

> [a]n amount equal to the value [as defined in the act] of the defense articles or of the defense services [salaries of military personnel excepted], or other assistance furnished, plus expenses arising from or incident to operations under [Part II] [salaries of military personnel and certain other costs excepted].

This reimbursement standard is essentially the "full reimbursement" standard of the Economy Act (see below). Procedures for determining the value of articles and services provided as security assistance under the Arms Export Control Act and the FAA are described in the Security Assistance Management Manual (DOD Manual 5105.38-M) and the sources referenced therein.

The emergency Presidential draw down authority of 22 U.S.C. § 2318 authorizes the President to direct DOD support for various State Department efforts that further national security, including counterdrug programs (22 U.S.C. § 2318(a)(2)(A)(i)). In addition, Part VIII of subchapter I (in Part I of the FAA) is the International Narcotics Control provision of the act (22 U.S.C. §§ 2291-2291k. A draw down of DOD resources may be reimbursed by a subsequent appropriation (22 U.S.C. § 2318(c)); however, this seldom occurs. When no appropriation is forthcoming, a Presidential draw down is another example of an authorized augmentation of accounts (DOD appropriations are used to achieve an objective ordinarily funded from State Department appropriations).

In addition to the above, Congress has authorized another form of DOD contribution to the State Department's counterdrug activities by providing that when DOD provides services in support of this program, it is reimbursed only for its "additional costs" in providing the services (i.e., its costs over and above its normal operating costs), not its full costs.

The flexible standard of reimbursement under the FAA mentioned above for efforts under Part I of the FAA is described in 22 U.S.C. § 2392(c). This flexible standard of reimbursement for interagency transactions is applicable when any other federal agency supports State Department foreign assistance (not military or security assistance) objectives for developing countries under the FAA.

> [A]ny commodity, service, or facility procured . . . to carry out subchapter I of this chapter [Part I] [foreign assistance] . . . shall be (reimbursed) at replacement cost, or, if required by law, at actual cost, or, in the case of services procured from the DOD to carry out part

VIII of subchapter I of this chapter [International Narcotics Control, 22 U.S.C. § 2291(a)-2291(h)], the amount of the additional costs incurred by the DOD in providing such services, or at any other price authorized by law and agreed to by the owning or disposing agency.

Note the specific reference to DOD services in support of State Department counterdrug activities. "Additional costs incurred" is the lowest acceptable interagency reimbursement standard. If Congress wishes to authorize more DOD contribution (that is, less reimbursement to DOD appropriations), Congress authorizes the actual expenditure of DOD funds for or on the behalf of other agencies. *See* National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, §§ 1001-11, 104 Stat. 1485, 1628-34 (1990) (providing general authority for DOD to engage in counterdrug operations); *see also* National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 1011, 108 Stat. 2663, 2836 (1994) (extending DOD's counterdrug authority through FY 1999).

The reimbursement standards for DOD in 22 U.S.C. § 2392(c) are interpreted in the DOD Accounting Manual (DOD Manual 7220.9-M). When DOD provides services in support of State Department counterdrug activities, the manual permits "no cost" recovery when the services are incidental to DOD missions requirements. The manual also authorizes pro rata and other cost sharing arrangements. *See* DOD Manual 7220.9-M, ch. 26, para. G.2.c.

Emergency authorities also exist to permit the U.S. to provide essential assistance to foreign countries when in the interest of U.S. security. *See, e.g.,* 22 U.S.C. § 2364 (President may authorize assistance without regard to other limitations if he determines it will assist U.S. security interests, and notifies Congress; certain limitations still apply).

Domestic Disaster Relief Operations

DOD Directive 3025.1 (Use of Military Resources during Peacetime Emergencies within the United States, its Territories, and Possessions) and AR 500-60 (Disaster Relief) regulate emergency disaster relief operations within the U.S. In 1989, Congress created the Defense Emergency Response Fund (DERF), funded with $100,000,000, to remain available until expended, to reimburse current appropriations used for supplies and services in anticipation of requests from other agencies for disaster assistance. Department of Defense Appropriations Act, 1990, Pub. L. No. 101-165, Title V, 103 Stat. 1112, 1126-27 (1989). The DERF legislation permits DOD to use DERF funds if the Secretary of Defense determines that immediate action is necessary before receipt of a formal request for assistance on a reimbursable basis from another federal agency or a state government. In 1993, Congress expanded DOD's ability to use DERF funds, to make this appropriation available after a request for assistance from another federal agency or a state government, if the Secretary of Defense determines that use of the fund is necessary. Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, § 8131, 107 Stat. 1418, 1470 (1993). This change makes DERF funds available for DOD domestic disaster assistance efforts after a request for assistance, and avoids DOD jeopardizing its O&M accounts by providing disaster assistance in the absence of a reimbursement agreement. However, DOD activities should continue to obtain reimbursement agreements as emergency conditions permit, rather than relying on DERF funding exclusively.

The Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. §§ 5121-5203) authorizes the President to direct federal agencies to provide assistance essential to meeting immediate threats to life or property resulting from a major disaster, with or without reimbursement. 42 U.S.C. §§ 5170a & 5170b. Agencies may immediately incur obligations by contract or otherwise in such amounts as are made available to them by the President. 42 U.S.C. § 5149(b). Federal agencies may receive reimbursement for their relief efforts if the Federal Emergency Management Agency (FEMA) requested assistance. Reimbursement is limited to expenses above normal operating levels. Agencies may credit reimbursements received to their operating accounts. 10 U.S.C. § 5147; AR 500-60, paragraph 5-3. A Memorandum of Understanding between DOD and FEMA should address reimbursements. DOD activities also should seek a FEMA tasking letter defining the exact scope of disaster relief responsibilities. The letter should state a not-to-exceed reimbursable amount, which DOD units should not exceed without approval from higher headquarters. [*See also* Chapter 21, Military Support to Civil Authorities.]

Correcting Purpose Act Violations

Finally, and importantly, improper expenditures of appropriated funds must be rectified. Improper expenditures can be rectified by identifying a proper source of appropriated funds, and transferring funds from it to the appropriation improperly used. Even when this is accomplished, it is possible an Antideficiency Act violation[8] has occurred. Improper uses of appropriated funds can be corrected without a violation of the Antideficiency Act only if the proper funds were available at the time of the use of the improper use of funds and the proper funds were available in an adequate amount at the time of the actual funding adjustment to correct the improper use of funds; and if the improper use of funds did not violate any statutory limitation on the use of funds, or a regulatory limitation on the use of funds that amounts to a formal subdivision of funds.[9] Even when an Antideficiency Act violation is unavoidable, however, an accounting adjustment to charge the proper appropriation still is required.

AVAILABILITY OF APPROPRIATIONS AS TO TIME

Although Congress appropriates to executive agencies some funds that are available until expended, most appropriations are available for limited periods. If funds are not obligated during these periods of availability, they expire. Expired funds are unavailable for new obligations (e.g., new contracts), but they may be available for adjustments to existing obligations (e.g., paying for an unexpected price increase under an existing contract). Appropriations have different periods of availability:

Operation and maintenance -- 1 year.
Procurement -- 3 years.
Construction -- 5 years.[10]

The bona fide need rule states that appropriations are only available to support needs arising during their periods of availability. *See* 31 U.S.C. § 1502(a) (the bona fide need statute). Existing contracts generally may be completed using appropriations current when they were awarded, even if performance extends beyond the end of the fiscal year (the fiscal year ends at midnight each September 30th). However, new requirements added to a contract (as distinguished from adjustments for price changes for work originally encompassed within a contract's scope) must be funded with current appropriations regardless of the money used for the original obligation. For service contracts, the need for the services generally is considered to arise at the time the services are performed, not when the contract is awarded. Therefore, the bona fide need rule generally requires new funding for services performed on or after October 1st of each new fiscal year. Certain statutory exceptions to this general rule are provided in 10 U.S.C. § 2410a.

Overstocking supplies at the end of a fiscal year violates the bona fide need rule. Purchases should cover only current year needs, and any inventory needed to cover the lead time before deliveries begin under contracts placed in the next fiscal year.

AVAILABILITY OF APPROPRIATIONS AS TO AMOUNT

Deploying forces must determine the amount of funds necessary and available to support their operations before deploying, and seek additional funds of the proper type for the purposes needed before or during the deployment as requirements develop. The amount available for deployment requirements will depend on the amount of funds allocated by higher headquarters. *See* 31 U.S.C. § 1514(a) (requires agencies to subdivide and control congressional appropriations). Agency regulations govern the uses of

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[8] *See infra* text under the heading Availability of Appropriations as to Amount.

[9] An example of such a regulatory restriction is the current $100,000 per item limitation on the use of O&M funds for the purchase of supplies. *See* DOD Manual 7110-1-M, Budget Guidance Manual, para. 241.4.C.1.f. (May 1990).

[10] Although the appropriation life of MILCON appropriations is five years, Congress has limited DOD's authorization to spend MILCON appropriations to three years in recent Authorization Acts. *See* Military Construction Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, ∋ 2701, 108 Stat. 2663, 3046 (1994).

and controls over appropriated funds to avoid obligations and expenditures in excess of the amount of funds available for a particular purpose. *See* DFAS-IN 37-1; DFAS-IN Manual 37-100-XX (the "XX" is the current fiscal year).

The Antideficiency Act (31 U.S.C. §§ 1341(a) & 1517(a)) prohibits any government officer or employee from:

(1) Making or authorizing an expenditure or obligation in excess of the amount available in an appropriation.
(2) Making or authorizing expenditures or incurring obligations in excess of formal subdivisions of funds; or in excess of amounts permitted by regulations prescribed under 31 U.S.C. § 1514(a).
(3) Incurring an obligation in advance of an appropriation, unless authorized by law.
Accepting voluntary services unless otherwise authorized by law. 31 U.S.C. § 1342.

Regulations require investigation of suspected ADA violations. DOD 7000.14-R, Financial Management Regulation, Vol. 14, DFAS-IN 37-1, ch. 7. These regulations also prescribe guidance for the conduct of investigations. If a statutory violation occurs, the agency must investigate to determine the senior responsible individual, report the circumstances and the individual's name to Congress through the ASA(FM) and DOD Comptroller, and impose administrative and/or criminal sanctions on that individual. No one is exempt. Lawyers, commanders, and resource managers have been found to be senior responsible individuals. Common problems that have resulted in ADA violations have included:

(1) Incurring obligations in advance of an appropriation (e.g., before passage of a new appropriations act or other spending authority (like continuing resolution authority) at the beginning of a new fiscal year).
(2) Exceeding the amount of a statutory funding limitation (e.g., a construction project exceeding $300,000 funded with O&M money).
(3) Obligating funds for purposes expressly prohibited by an annual or permanent limitations on uses of appropriated funds.

THE ECONOMY ACT

The Economy Act, 31 U.S.C. § 1535, provides general authority for federal interagency transactions. It authorizes interagency transactions when no other statute permits the providing agency to render the requested service, and when the requested service is not one for which the providing agency has already received funds. Merit Sys. Protection Board--Travel Expenses of Hearing Officers, B-195347, 59 Comp. Gen. 415 (1980). Funds normally are transferred between the military services and between DOD and other agencies using a Military Interdepartmental Purchase Request (MIPR), DD Form 448.

The Economy Act is not applicable to interagency transactions conducted under the authority of the FAA because the latter contains internal interagency transactions authorities. 22 U.S.C. § 2392(c) & (d).

The Economy Act mandates full reimbursement to the providing agency, including indirect costs incurred by that agency to provide the requested service. Augmentation occurs if less or more than the full applicable costs are reimbursed to the providing agency (57 Comp. Gen. at 682-83).

Other authorities may permit reimbursement of less than the full cost of providing services to a requesting agency, but the Economy Act requires full reimbursement from the requesting agency to the providing agency. Because the Economy Act requires exact reimbursement, neither less nor more, it prohibits reimbursement for costs which are properly charged to the mission of the providing agency. Consequently, the Economy Act does not prohibit separately funded agencies from undertaking authorized activities which support a common goal; in fact, it prohibits reimbursement between agencies when both have a mission and appropriations to accomplish complementary activities.

CONCLUSION

Congress limits the authority of DOD and other executive agencies to use the funds appropriated to them. The principle controls imposed on the use of appropriated funds, the purpose, time, and amount limitations discussed above, apply during military operations and to all other federal activities. The GAO, service audit agencies, and the Inspectors General, monitor DOD compliance with fiscal controls on appropriated funds. Improper uses of funds (e.g., funds used for a purpose other than that for which they were appropriated), even if otherwise lawful, may be corrected under some circumstances, but

preventive practice by JAs accompanying deploying forces can avoid most improper uses. Funding violations may result in adverse administrative or criminal consequences against those responsible.

REFERENCES FOR FURTHER RESEARCH

Statutes

1. Title 31, U.S. Code.
2. Annual DOD Authorization and Appropriations Acts.

Regulations

1. DOD: DOD Reg. 7000.14-R, Financial Management Regulation, vols. 1-15 (this will replace DOD Manual 7220.9-M below, when all volumes are published, but as of March 1996, only volumes 1, 2, 4, 5, 7, 8, 11, 13, 14, and 15 are published).
   DOD Manual 7220.9-M, DOD Finance & Accounting Manual.
   DOD Manual 7110.1-M, DOD Budget Guidance Manual.

2. Army: DFAS-IN 37-1.
   DFAS-IN Manual 37-100-XX (the "XX" is the current fiscal year).

3. Navy: Navy Comptroller Manual.

4. Air Force: AFR 170-6.
   AFR 170-8.
   AFR 170-13.
   AFI 65-601.
   AFR 177-16.

Decisional Law Decisions of the Comptroller General of the United States (a bound reporter published by the Government Printing Office, cited as "Comp. Gen."; agencies can request advance opinions concerning their operations by forwarding a request through channels--see AR 37-1, para. 20-19).

Treatises

1. GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, 2d ed., GAO/OGC 91-5 (July 1991) (to be issued in four volumes; volumes 1 and 2 are in print as of January 1994).
2. GENERAL ACCOUNTING OFFICE, ACCOUNTING GUIDE, GAO/AFMD-PPM-2.1 (Sept. 1990).
3. GENERAL ACCOUNTING OFFICE, POLICIES AND PROCEDURES MANUAL FOR GUIDANCE OF FEDERAL AGENCIES, Title 7 (Feb. 1990).